IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1229 OF 2005
IN
EXECUTION APPLICATION NO.488 OF 2004

Mahendra J. Vora and others Applicants

versus

Renuka Builders and Developers Pvt.Ltd. (Now known as Sheth Realcon Ventures Pvt.Ltd.) & ors. Respondents

Shri Kevik Setalwad i/by Bhuta & Associates for applicants.

Shri M.D.Siodia with Ms.B.S.Retiwala for respondent no.1.

Shri P.G.Lad for respondents 2 and 3.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 03.04.2006

DATE OF PRONOUNCING THE JUDGEMENT : 05.06.2006

PC :

1. This Chamber Summons is by the applicants for several reliefs but more particularly prayer clauses (a)-(i), (iii) and (iv) have been pressed.

2. The facts which are not in dispute are that an execution application has been filed to

execute an award in Arbitration proceedings. In the year 1996 respondent no.1 filed a suit in this court being Suit No.191 of 1996 for specific performance of the Agreement dated 29th November 1991. At the hearing of said suit, this Court was pleased to refer the dispute to the Arbitration of Mr.Sam P. Rao, Architect of M/s.Poonagar Billimoria and Co.. Subsequent thereto, the learned Arbitrator entered upon reference.

3. During the proceeding before the learned Arbitrator, the parties decided to resolve the disputes by consent and accordingly consent terms were framed and finalised with the intervention of learned Arbitrator.

4. On 26th January 2000, first award by consent came to be passed.

5. It was directed that on the applicants complying with the obligation no.3 within a period of four months, the applicants and the respondent no.1 to share the flats so released from the ULC Authorities in the ratio of 35:65. On the applicants failing to procure release of the flats from the ULC Authorities within a

period of four months of the signing of the said consent terms, the respondent no.1 to pursue the same with the ULC Authorities for securing release of the flats.

6. On the respondent no.1 succeeding to obtain release of flats by the ULC Authorities, the respondent no.1 to pay to the applicants Rs.270/- per sq.ft. of the area of released within 30 days of procuring such order of release.

7. On the expiry of the said period of four months, as the applicants were not able to comply with their obligations, the learned Arbitrator handed over the Power of Attorney to the respondent no.1 to do all acts, deeds and things necessary to procure the P.R.Cards and cause to release the flats by the ULC Authorities under the terms of the said consent terms.

8. The respondent no.1 under said Power of Attorney made applications dated 14.6.2000, 16.6.2000 and 21.6.2000 to the office of Competent Authority constituted under the ULC Act, 1976 for causing to obtain release of the flats reserved for Government nominees as per the ratio laid down by the Hon’ble Supreme Court in

the case of Shanti Star Vs. State of Maharashtra. In June 2000, respondent no.1 was informed by the Office of the Competent Authority that they cannot process two applications at a time with respect to the same property, as the applicants were still pursuing their application. The respondent no.1 informed the Office of the Competent Authority that as per the Award dated 26th January 2000, the applicants were not entitled to pursue their application after the expiry of said period of four months from the date of signing of the said Consent Terms i.e. after 26th May 2000.

9. Upon such representation by respondent no.1 to the Competent Authority, the Competent Authority requested the respondent no.1 to procure requisite clarification from the learned Arbitrator with regard to the representation of the respondent no.1.

10. Respondent no.1 through their then Advocates' letters dated 3.7.2000 and 5.7.2000 informed the learned Arbitrator of the developments in the matter and to issue necessary clarification/interpretation with regard to the entitlement of the benefits and the right to

pursue the application with the ULC Authorities. Pursuant to clause 13 of the said Consent Terms, the learned Arbitrator passed an Additional Award on 16th September 2000 issuing necessary clarification/interpretation of the dis-entitlement of the applicants to pursue their application with the ULC Authorities after the said period of four months from the date of signing of the said Consent Terms i.e. after 26.5.2000 and also regarding the dis-entitlement of the applicant to receive the benefit thereof after the expiry of the said period of four months from the date of signing of the said Consent Terms. Respondent no.1 made an application dated 25.9.2000 to the Competent Authority constituted under the ULC Act, 1976 for the release of the flats by the ULC Authorities to respondent no.1. The other dates and events leading to this Chamber Summons are referred in subsequent paragraphs.

11. In pursuance of an order passed by this Court on 10th August 2005, the present Chamber Summons has been taken out by the applicants and the principal relief that is claimed is appointment of Court Receiver as Receiver in execution of 22 ownership flats more particularly

described in Annexure-A to the Chamber Summons, injunction restraining respondents 2 and 3 from transferring, disposing off, alienating, parting with possession and/or otherwise creating any third party rights in respect of these flats.

12. Insofar as other 11 ownership flats described in Annexure-B, similar reliefs are claimed.

13. In case of both flats namely 22 flats in Annexure-A and 11 flats in Annexure-B, compensation by way of mesne profits and/or damages for the loss caused by wrongful surrender of the applicants' entitlement of 35% share in 22 flats and 11 flats, is also claimed.

14. Shri Setalwad - learned counsel appearing for the applicants invited my attention to the affidavit in support of this Chamber Summons, the award which was signed and delivered on 26th January 2000, the additional award dated 16th September 2000 and further directions/award of 3rd December 2001. He also invites my attention to the consent terms. In his submission, the order passed by this Court in Arbitration Petition No.63 of 2002, does not preclude

applicants from filing an Execution Application and enforcing the award dated 26th January 2000. He submits that 26 flats are sold by respondent no.1. He thereafter invited my attention to Exhibit-2 to the affidavit in support of this Chamber Summons, which is a communication from the Housing and Special Assistance Department, Mantralaya. Thereafter, he has invited my attention to a letter dated 14th September 2001 recording that applicant has surrendered 963.91 sq.mtrs. of built-up area in the form of 22 tenements to Government for Government Nominees. He submits that as per the State Government, the developer was to surrender 1032.71 sq.mtrs. of built-up area to Government. Thus, there is 63.80 sq. mtrs. balance built-up area to be surrendered from the proposed construction. It is on this basis that the occupation certificate has been granted.

15. In the submission of shri Setalwad, by letter dated 5th October 2001 addressed to the learned Arbitrator, the advocate appearing for respondents (Renuka Builders and Developers Limited) pointed out that two Power of Attorneys, pursuant to the award executed by respondents 1 to 3 in favour of the claimants and kept in

escrow with the Arbitrator, were handed over to the claimants, to enable them to pursue the matters with the Urban Land Ceiling Authorities (ULC Authorities) and Municipal Corporation of Greater Bombay (MCGB). Thereafter, the flats have been surrendered. He submits that this letter proceeds on the basis that as per clause 5(1) of the consent terms dated 26th January 2000, respondents 1 were to pay the sums mentioned in paragraph 4 of the letter dated 5th October 2001. Further, as per paragraph 5 of this letter, in terms of clause 6(a) of the consent terms, the sum mentioned (Rs.44.00 lakh) was to be paid. In fact, both sums mentioned in this letter were to be paid over and willingness is expressed in that behalf.

16. My attention is also invited to clauses 6(c) and 8(c) and 8(d) of the consent terms.

17. He also invites my attention to the fact that act of surrender of the flats is bad in law. He submits that when the respondent no.1 surrendered 22 flats to the ULC Authorities on 14th September 2001, the competent authority had not refused applicants' application dated 28th April 2000. In these circumstances, there is a

breach of the obligations and the Arbitrator was rightly moved. Even if the additional award is set aside by this Court in the Arbitration Petition, in the light of Division Bench order, it is permissible to enforce the obligations under the consent award dated 26th January 2000.

18. Shri Setalwad's argument is that merits of the applicants' claim have not been adjudicated upon in Writ Petition No.593 of 2003 and in Review Petition (L) No.43 of 2004. He submits that therefore the reliefs which are claimed in the present Chamber Summons, can be granted. The reliefs proceed on the basis that the respondent no.1 cannot get 65% of the share of 22 flats which were wrongfully surrendered. He has invited my attention to paragraphs 32 to 34 of the affidavit in support of this Chamber Summons and submits that the same deserves to be granted.

19. In support of his submissions Shri Setalwad has placed reliance upon a decision of the Supreme Court reported in (1995)5-SCC-238 (B.Gangadhar Vs. B.G.Rajlingam).

20. On the other hand, Shri Siodia - learned counsel appearing for the first respondent

submits that the execution application itself is bad in law and not maintainable. He submits that applicants cannot file an application for execution of the award dated 26th January 2000 as the same is not final award. The additional award was passed on 16th September 2000. He submits that whatever was payable under the award dated 26th January 2000 (award under execution), has been paid by respondent no.1 and now nothing is due and payable.

21. He invites my attention to paragraph 6 of the affidavit in reply and the facts set out therein and submits that the Exemption Order dated 18th October 1991 stipulates that on completion of development of the property, owners/developers were to surrender only 5% of the total built-up area. Therefore, certain constructed areas were due for release for sale in open market by respondent no.1.

22. He invites my attention to the fact that the applicants were to fulfill certain obligations under the consent terms and more particularly those specifically enlisted in para XII of the affidavit in reply of first respondent.

23. He submits that a total number of 48 flats were reserved for Government nominees out of which the respondent no.1 had already surrendered 5 flats to the ULC Authorities leaving a balance of 43 flats for government nominees. Pursuant to the application dated 25.09.2000 made by the respondent no.1, the ULC Authorities were pleased to issue Corrigendum dated 28.11.2000 requiring the respondent no.1 to surrender 1061.72 sq.mtrs. of built up area (b.u.a.) being 5% of the total constructed area as per ratio laid down in the case of Shanti Star. As a consequence thereof, the respondent no.1 were required to surrender only 22 flats (including the 5 flats already surrendered) to the ULC Authorities. The ULC Authorities have issued a corrigendum dated 14.09.2001 and also issued letter dated 14.09.2001 to the Executive Engineer, P & R Ward, Kandivali (West), Mumbai, recording the aforesaid facts. The ULC Authorities were pleased to release 26 flats to the respondent for sale in the open market. He invited my attention to the corrigendums and letter of ULC Authorities. He submits that upon this application dated 25th September 2000 of the respondent no.1, respondent no.1 procured release of 26 flats reserved for government nominees. It is also submitted that

as required, respondent no.1 surrendered 22 flats to the ULC Authorities. The respondent no.1 acted upon the said Additional Award dated 16th September 2000 and sold the said 26 flats in the open market to the prospective flat purchasers and received the consideration thereof. The said Additional Award is binding upon the applicants as the same has not been challenged by the applicants.

24. The applicants, therefore, are only entitled to monetary consideration of Rs.270/- per sq.ft. of the flats so released. In view of change in policy of Government flats are released, then, respondent no.1 is entitled to the same. Therefore, there is no question of waiver of the rights of first respondent. He has invited my attention to the fact that monetary sums/consideration at the above rate which comes to Rs.34,00,380/-, has been deposited with the Sole Arbitrator, to be paid to the applicants. In these circumstances and more particularly when the applicants failed and neglected to get the flats released from the ULC Authorities within the stipulated time, and respondent no.1 making an application and getting flats so released, no relief muchless reliefs claimed in the Chamber

Summons, can be granted.

25. He submits that insofar as the cheques of Rs.44 lakh which have been deposited with the learned Arbitrator by first respondent at the request of applicants, the same have duly been encashed by the applicants. In such circumstances, no relief can be granted.

26. With the assistance of learned counsel appearing for both sides I have perused the award dated 26th January 2000 and the additional award dated 16th September 2000. I have also perused the Chamber Summons, affidavit in support and other annexures thereto. I have also perused the affidavit in reply to this Chamber Summons.

27. My attention was invited to the order dated 27th July 2004 and the order passed by the Division Bench in appeal. The rejoinder affidavit is also perused by me.

28. It is not in dispute that the applicants instituted Arbitration Petition No.63 of 2002 to challenge the award of the Sole Arbitrator dated 3rd December 2001. This Court has noted the fact that an interim award was made in terms of the

consent terms by the Arbitrator. The Arbitrator proceeded to dispose of one unresolved dispute between the parties. The controversy arising out of the consent terms before the learned Single Judge, is in relation to clause-5. The learned Judge has noted that 43 flats were kept aside for surrender to the Government by respondent no.1 herein, but there was a change in the policy of Government. The petitioners were pursuing the matter with the Government for reducing the number of flats that are to be surrendered to the State Government. The consent terms provide as to how an application is to be made and prosecuted in that behalf. The consent terms also provided for consequences if the Government reduces the number of flats to be surrendered. Clause-13 is the Arbitration clause. The learned Single Judge refers to the application made to the Arbitrator by respondent no.1 on 3rd July 2000. He also refers to an additional award dated 16th September 2000. It is pertinent to note that before the Single Judge a contention was raised on behalf of the applicants that this additional award, is without jurisdiction. However, the additional award dated 16th September 2000, was not challenged in the arbitration petition.

29. The learned Single Judge has noted this fact and the orders passed by the Government subsequently reducing the number of flats. The Arbitrator informed the applicants herein on 1st December 2000 that they were not entitled to the benefits of the release order issued by the Government. It is pursuant to that position that the first respondent took a stand as reflected in their Advocate's Letter dated 5th October 2001. It is on the basis of this advocate's letter that the Arbitrator made an award on 3rd December 2001 which is described as additional award. The Arbitrator held that the applicants are entitled only to money and not the flats. The challenge to this award has been upheld and in para 3 of the judgement of learned Single Judge, he has observed that the Arbitrator could not have made an award on 3rd December 2001 as it was conceded before him that the Arbitrator had no authority to monitor the performance of the obligations of the parties under the awards dated 26th January 2000 and 16th September 2000. He, therefore, assumed jurisdiction erroneously. It is in these circumstances that a declaration was issued by this Court that the award made by the Arbitrator dated 3rd December 2001 is clearly without

jurisdiction. The applicants' petition was allowed. The order was not set aside by the Division Bench but all that was observed by the learned Division Bench was that the order of learned Single Judge, cannot be construed to mean that the Sole Arbitrator may not act as per consent terms.

30. It is not disputed before me by both sides that the State Government rejected application of the applicants made on 28th April 2000 vide it's order dated 15th November 2002 on the ground that the land admeasuring 24,732 sq.mtrs. held in the name of one Nagpal, did not form part of the Exemption Order dated 20th October 1989 as there was a separate order dated 30th October 1980 under section 8(4) in the case of said Nagpal. The benefit which was given to one Peirera was not available for the land belonging to the applicants. Aggrieved by this order, a Writ Petition being Writ Petition No.593 of 2003 was filed and the same was rejected by this court vide order dated 26th August 2003. A Special Leave Petition was filed in the Supreme Court which was dismissed on 19th December 2003. The Review Petition was also rejected by Supreme Court on 10th December 2004. The applicants

thereafter filed a Review Petition in this Court being Review Petition (L) No.43 of 2004 for review of order dated 26th August 2003 (original order on the writ petition), which was also dismissed by this Court on 15th February 2005. When the learned Single Judge passed an order on the Arbitration Petition, a Chamber Summons being Chamber Summons No.829 of 2002 was already taken out and was pending. The applicants did not apply for any reliefs in terms of the Chamber Summons. That Chamber Summons was ordered to be heard along with Arbitration Petition. Despite pendency of the earlier Chamber Summons, another Chamber Summons was taken out, being Chamber Summons No.410 of 2005, for amending earlier Chamber Summons. Both Chamber Summonses were disposed off by this Court on 10th August 2005.

31. I have also perused the first award and the consent terms and the obligations thereunder. It is not in dispute that earlier policy of the Government was of 10% flats be surrendered to Government Nominees. The applicants were to make appropriate application within seven days from the date of signing the consent terms for getting the flats released. They were to follow up these applications and also get the flats or atleast 21

of them released by ULC Authorities within four months from the date of signing of the consent terms. On applicants' complying with the aforesaid obligation within the period specified, the applicants and respondent no.1 were to share the flats so released from the ULC Authorities, in the ratio of 35:65.

32. On the applicants' failing to procure release of flats from the ULC Authorities within the time stipulated above, liberty was granted to first respondent to pursue the issue of surrender with the ULC Authorities. Upon respondent no.1 succeeding in obtaining release of the flats from ULC Authorities, they were to pay to the applicants Rs.270/- per sq.ft. of the area so released within 30 days from the date of procuring the order of release.

33. Since the applicants were not in a position to comply with their obligations, upon expiry of the period stipulated, learned Arbitrator handed over Power of Attorney to respondent no.1 to do all acts, deeds and things necessary for securing release of the flats. Pursuant to this Power of Attorney, first respondent made an application in the office of the competent authority. Initially

they were informed that even the applicants' application was pending but subsequently first respondent moved the competent authority and pointed out that there is no question of the applicants now being entitled to pursue their application. With the clarification made by first respondent, the competent authority passed the orders of release and issued letters and corrigendums referred to in details above.

34. Thus, it is clear that even if the award of 3rd December 2001 is set aside by this Court, all other awards remained along with the obligations thereunder. The consent terms were also very much holding the field. In these circumstances, the applicants cannot get any benefit of the additional award dated 3rd December 2001 being set aside. They were fully aware of the fact that the earlier awards having not been challenged and therefore, they pursued the remedy of writ petition to challenge the order of competent authority.

35. In these circumstances, there is much substance in the contentions of Shri Siodia that this Chamber Summons is not maintainable. For reasons already recorded by me, beyond monetary

consideration, nothing was due and payable to the applicants. There cannot be enforcement and execution of any other obligations as the entire controversy was resolved by the consent awards. Parties have acted in pursuance of the same. They have worked out the terms by approaching the ULC Authorities. Thus, the only issue surviving between them has also been resolved. The applicants are entitled to the sums which are deposited and respondent no.1 having expressed their willingness to these sums being released in favour of applicants, that is all that they are entitled to and can be granted. It is not possible to agree with the submissions of Shri Setalwad that even if the writ petition is rejected, the controversy survives and the earlier awards can be enforced and executed. It may be that an execution application can be filed but considering the reciprocal obligations and perusing the documents including the order of the Government, it is not possible to accept his submissions and grant any reliefs to the applicants.

36. The Chamber Summons is, therefore, dismissed.

37. The judgement relied upon by Shri Setalwad is not applicable to the facts and circumstances of present case. There was a decree for possession of an immovable property which was being enforced and while laying down the settled principle that the decree holder is entitled to vacant possession of the property, the Supreme Court observed that a direction could be issued to persons in possession to so hand over the same. I fail to understand as to how this judgement can have any application to the present facts and circumstances.

38. Thus, no relief can be granted in this Chamber Summons. It is accordingly dismissed. Ad-interim order of status-quo passed against respondent nos.2 and 3, is also vacated. Moreso, because the respondents 2 and 3 have stated on affidavit that the surrender has already been completed inasmuch as respondents 2 and 3 have allotted 21 flats out of 22 surrendered. In para 3 of the affidavit, a reference is made to 14 agreements and it is pointed out that the allottees having paid the purchase price, the respondents 2 and 3 have no control over 14 flats. In para 4, the Town Planner points out that the list of persons to whom the flats are

allotted, is already furnished. In these circumstances, there cannot be order against respondents 2 and 3. The order of status-quo, atleast in respect of the flats which are already sold and allotted, cannot be granted. The order of status-quo is, therefore, vacated.

39. It is clarified that the Arbitrator can, upon application of applicants, release the amounts held by him in Escrow till date and if invested by him with accrued interest.

40. At this stage the learned advocate appearing for the applicant prays for continuation of the order of status-quo. In the light of the observations made by me, it is not possible to accede to this request. Application for continuation of status-quo stands rejected.

(S.C.DHARMADHIKARI, J.)